

IP 03-0006-CR 1 T/F USA v Gross
Magistrate Kennard P. Foster

Signed on 04/26/2006

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	Cause No. IP 03-6-CR-01 (T/F)
)	
KEVIN GROSS,)	
)	
Defendant.)	

MAGISTRATE JUDGE’S REPORT AND RECOMMENDATION

This matter is before the undersigned U. S. Magistrate Judge pursuant to the Orders entered by the Honorable John Daniel Tinder, Judge, on November 30, 2005 and April 18, 2006, designating this Magistrate Judge to conduct hearings on the Petition for Summons or Warrant for Offender Under Supervision filed with the Court on November 28, 2005, and the Supplemental Petition for Summons or Warrant for Offender Under Supervision filed with the Court on April 17, 2006, and to submit to Judge Tinder proposed Findings of Facts and Recommendations for disposition under Title 18 U.S.C. §§3401(i) and 3583(e).

Proceedings were held on December 9, 2005, December 12, 2005, April 21, 2006, and April 25, 2006, in accordance with Rule 32.1 of the *Federal Rules of Criminal Procedure*. At the proceedings on December 9, 2005, Mr. Gross appeared in person with his appointed counsel, William Dazey, Office of the Indiana Federal Community Defender; the government appeared by

Mark Massa, Assistant United States Attorney; and U. S. Parole and Probation appeared by Chris Dougherty, U. S. Parole and Probation officer, who participated in the proceedings.

On December 9, 2005, the Court conducted the following procedures in accordance with Rule 32.1(a)(1) *Federal Rules of Criminal Procedure* and Title 18 U.S.C. §3583:

1. William Dazey, Office of Indiana Federal Community Defender, was present and appointed by the Court to represent Mr. Gross in regard to the pending Petition for Revocation of Supervised Release.

2. A copy of the Petition for Revocation of Supervised Release was provided to Mr. Gross and his counsel who informed the Court that they had read and understood the specification of violations and waived further reading thereof.

3. Mr. Gross was advised of his right to a preliminary hearing and its purpose in regard to the alleged specified violations of his supervised release contained in the pending Petition, filed November 28, 2006.

4. Mr. Gross would have a right to question witnesses against him at the preliminary hearing unless the Court, for good cause shown, found that justice did not require the appearance of a witness or witnesses.

5. Mr. Gross had the opportunity to appear at the preliminary hearing and present evidence on his own behalf.

6. If the preliminary hearing resulted in a finding of probable cause that Mr. Gross had violated an alleged condition or conditions of his supervised release set forth in the Petition, he would be held for a revocation hearing before the undersigned Magistrate Judge, in accordance with Judge Tinder's designation entered on November 30, 2005.

7. Mr. Dazey stated that Kevin A. Gross would stipulate there is a basis in fact to hold him on the specifications of violation of supervised release set forth in the Petition. Mr. Gross executed a written waiver of the preliminary examination, which was accepted by the Court.

8. A revocation hearing was set for December 12, 2005.

On December 12, 2005, the Court conducted the following proceedings, in accordance with Rule 32.1(a)(1) *Federal Rules of Criminal Procedure* and Title 18 U.S.C. §3583:

1. Mr. Gross, by counsel, stipulated that he committed specifications of violations set forth in the Petition for Warrant or Summons for an Offender Under Supervision, filed with the Court on November 28, 2005 as follows:

<u>Violation Number</u>	<u>Nature of Noncompliance</u>
1	<p>“The defendant shall not illegally possess a controlled substance.”</p> <p>The offender has submitted two positive urine screens for cocaine. The first positive urinalysis sample was taken on June 27, 2005, while the offender was being supervised in the Middle District of Florida. Mr. Gross admitted this positive sample and due to other noncompliance issues and the refusal of the probation officer in Florida to continue to supervise him, Mr. Gross’ supervision was transferred back to the Southern District of Indiana on September 1, 2005. This positive urine screen was reported to the court per a petition on July 18, 2005, and this probation officer requested no action be taken at that time. The offender submitted a second positive urine sample for cocaine on November 11, 2005.</p>
2	<p>“The defendant shall participate in a program of testing and treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as the defendant is released from the program by the probation officer, and shall pay a portion of fees of the program.”</p> <p>The offender has failed to report for six required urine screens on the following dates: September 24, 2005, October 24, 2005, October 26, 2005, October 28, 2005, October 31, 2005, November 17, 2005. The offender failed to report for a counseling session on November 16,</p>

2005. The offender has failed to pay his required substance abuse co-pay fee of \$150, which is used for the cost of urine collection/testing and treatment sessions.

- 3 **“The defendant is prohibited from incurring any new credit charges or opening new lines of credit, individually or jointly, without the approval of the probation officer.”**

The offender has opened at least five lines of credit and/or personal loans, with balances of approximately \$47,000. These debts were incurred within the last 18 months and were all incurred without approval from the probation office. The offender admitted he surreptitiously opened these lines of credit and stated that he felt he “deserved” these things. The items include a car loan of \$27,260 for a 2004 Nissan automobile, and \$4,436 for a motorcycle for the offender’s son.

- 4 **“The defendant shall pay any restitution imposed by this judgment that remains unpaid at the commencement of the term of supervised release.”**

The offender has not made a good faith effort to pay restitution. The offender has not made a restitution payment since March 22, 2005. In nearly three years of supervision, he has only paid a total of \$1,248.28, which amounts to approximately \$36 per month.

The proceedings were then adjourned pending disposition, which proceedings were set for June 15, 2006.

On April 17, 2006, a Supplemental Petition for Warrant or Summons for Offender Under Supervision was filed in this cause. On April 18, 2006, the Honorable John Daniel Tinder issued an Order, designating the undersigned United States Magistrate Judge to conduct hearings on this Supplemental Petition on the defendant, and to submit to Judge Tinder proposed findings of fact and recommendations for disposition.

On April 21, 2006, the following proceedings were held:

1. The defendant appeared in person and with his court-appointed counsel, William Dazey.

2. A copy of the April 17, 2006 Supplemental Petition for Revocation of Supervised Release was provided to Mr. Gross and his counsel who informed the Court that they had read and understood the specifications of each alleged violation and waived further reading thereof.

3. Mr. Gross was advised of his right to a preliminary hearing and its purpose in regard to the alleged specified violations of his supervised release contained in the pending April 17, 2006 Petition.

2. Mr. Gross was informed he would have a right to question witnesses against him at the preliminary hearing unless the Court, for good cause shown, found that justice did not require the appearance of a witness or witnesses.

3. Mr. Gross was informed he had the opportunity to appear at the preliminary hearing and present evidence on his own behalf.

4. Mr. Gross was informed that if the preliminary hearing resulted in a finding of probable cause that Mr. Gross had violated the alleged condition or conditions of supervised release set forth in the Petition, he would be held for a revocation hearing before the undersigned Magistrate Judge, in accordance with Judge Tinder's designation on April 18, 2006.

5. Mr. Gross stated his readiness to waive the preliminary hearing regarding the April 17, 2006 Supplemental Petition under consideration. Mr. Gross then waived, in writing, the preliminary hearing and he was held to answer.

6. Mr. Dazey stated that Kevin A. Gross would stipulate there is a basis in fact to hold him on the specifications of violation of supervised release set forth in the Supplemental Petition.

7. Defendant orally moved for a continuance of the revocation hearing. The Court granted the same and the revocation hearing was reset for April 25, 2006.

On April 25, 2006, a revocation hearing was conducted. Mr. Gross appeared in person and by his court-appointed counsel, William Dazey, Office of the Indiana Federal Community Defender; the government appeared by Christina McKee, Assistant United States Attorney; and U. S. Parole and Probation appeared by Chris Dougherty, U. S. Parole and Probation officer.

The parties stipulated the following in open Court:

(1) Mr. Gross and the government agreed they were ready to proceed to disposition on the pending Petitions to REVOKE Mr. Gross's supervised release in open Court this date.

(2) Mr. Gross admitted that he committed the violations of specifications set forth in the Supplemental Petition to Revoke Supervised Release, filed with the Court on April 17, 2006, as follows:

<u>Violation Number</u>	<u>Nature of Noncompliance</u>
5	<p>“The defendant shall not illegally possess a controlled substance.”</p> <p>The offender has submitted four positive urine screens for cocaine. The two most recent screens which were positive for cocaine were collected on April 11, 2006, and April 13, 2006. Two prior positive screens for cocaine were reported to the Court in a petition filed on November 23, 2005. The offender admitted the two earlier positive screens in a violation hearing before U.S. Magistrate Judge Kennard P. Foster on December 2, 2005, and he was found in violation, but the Court held disposition in abeyance and reset the hearing for June 15, 2006. All prior violation conduct information is contained in the prior petition. Only newly alleged violations will be included in this supplemental petition.</p>
6	<p>“The defendant shall participate in a program of testing and treatment for drug and/or alcohol abuse, as directed by the probation officer, until such time as the defendant is released</p>

from the program by the probation officer, and shall pay a portion of fees of the program.”

The offender submitted dilute urine screens on December 13, 2005, and December 14, 2005. He was ordered to wear a drug detecting sweatpatch on December 13, 2005. The offender tampered with the patch on several occasions and he submitted untestable patches on the following dates: December 20, 2005, December 27, 2005, January 3, 2006, January 20, 2006, January 26, 2006, and February 10, 2006. A urine screen which was collected on January 26, 2006, had trace amounts of cocaine present, but not enough to meet the criteria for a positive test. This urine screen was collected due to an untestable patch. This officer questioned the offender and he admitted he used cocaine on January 20, 2006, and subsequently tampered with his patch to avoid detection.

The offender was ordered to attend a Narcotics Anonymous relapse prevention group every Friday evening beginning in December of 2005. According to sign-in sheets, the offender failed to report for three meetings in February 2006, and failed to report for a single meeting during the month of March 2006.

7 **“The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.”**

The offender quit his employment at Andy Mohr Nissan on March 14, 2006. This officer discovered he quit by visiting his employer on March 23, 2006. The offender was fired from Indy Honda on April 7, 2006, and again, this officer did not learn of this information until contact was made with the offender’s former employer on April 12, 2006. The offender stated he did not contact this officer because he did not want “conflict.”

(4) Mr. Gross has a relevant criminal history category of V. *See*, U.S.S.G. §7B1.4(a).

(5) The most serious grade of violation committed by Mr. Gross constitutes a Grade B violation, pursuant to U.S.S.G. §7B1.1(b).

(6) Pursuant to U.S.S.G. §7B1.4(a) upon revocation of supervised release the range of imprisonment applicable to Mr. Gross is 18-24 months.

(7) The parties did not agree on the appropriate disposition of the case.

1. The defendant, by counsel, and the government each presented evidence regarding appropriate disposition of the case.

The Court, having heard the admissions of the defendant, the stipulations of the parties, and the arguments and discussions on behalf of each party, **NOW FINDS** that the defendant, Kevin A. Gross, violated the above-delineated conditions in both Petitions.

Mr. Gross's supervised release is therefore **REVOKED** and he is sentenced to the custody of the Attorney General or his designee for a period of 24 months, with no supervised release to follow. The service of the sentence shall begin immediately. The Court recommends that the defendant be subject to the Bureau of Prisons' extensive drug and alcohol treatment program during commitment. The Court further recommends that the defendant be designated to the Federal Correctional Institution at Manchester, Kentucky for service of his sentence.

The Magistrate Judge requests that Ms. Dougherty, U. S. Parole and Probation Officer, prepare for submission to the Honorable John Daniel Tinder, Judge, as soon as practicable, a supervised release revocation judgment, in accordance with these findings of facts, conclusions of law and recommendation.

You are hereby notified that the District Judge may reconsider any matter assigned to a Magistrate Judge pursuant to Title 28, U.S.C. §636(b)(1)(B) and (C) and Rule 72(b) of the *Federal Rules of Civil Procedure*. You shall have within ten days after being served a copy of this Report and Recommendation to serve and file written objections to the proposed findings of facts and conclusions of law and recommendations of this Magistrate Judge. If written objections to the Magistrate Judge's proposed findings of fact and recommendations are made, the District Judge will

make a *de novo* determination of those portions of the Report or specified proposed findings or recommendations to which an objection is made.

The District Court may refuse to accept the stipulations and waivers and conduct a revocation hearing pursuant to Title 18 U.S.C. §3561 *et seq.* and Rule 32.1 of the *Federal Rules of Criminal Procedure* and may reconsider the Magistrate Judge's Report and Recommendation, including making a *de novo* determination of any portion of the Report or specified proposed findings or recommendation upon which he may consider.

WHEREFORE, the U. S. Magistrate Judge **RECOMMENDS** the Court adopt the above report and recommendation revoking Mr. Gross's supervised release and the sentence imposed of imprisonment of 24 months in the custody of the Attorney General or his designee; that the defendant be designated to the Federal Correctional Institution at Manchester, Kentucky, where he also will be subject to the Bureau of Prisons' extensive drug and alcohol treatment program during commitment; and that at the conclusion of Mr. Gross's incarceration, he not be subject to supervised release.

IT IS SO RECOMMENDED this 26th day of April, 2006.

Kennard P. Foster, Magistrate Judge
United States District Court

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